

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

ALBERTSON'S LLC

and

Case 28-CA-21744

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 1564

Richard A. Smith, Esq., for the General Counsel.

Greg Frazier, Secretary Treasurer,
of Albuquerque, NM for the Union.

Charles C. High, Esq. and *Gilbert Sanchez, Esq.*,
(*Kemp Smith*) of El Paso, TX, for the Respondent.

DECISION

Statement of the Case

WILLIAM G. KOCOL, Administrative Law Judge. This case was tried in Las Cruces, New Mexico, on July 22-23, 2008. The charge was filed by the United Food and Commercial Workers Union, Local 1564 (herein the Union) on January 25, 2008.¹ The complaint was issued March 28, and alleges that Albertson's LLC (herein Albertson's) violated Section 8(a)(1) of the Act by: interrogating its employees about their union activities and sympathies, threatening employees with unspecified reprisals because they engaged in union activities, and orally promulgated and maintained an overly-broad and discriminatory rule prohibiting employees from contacting or speaking to the Union. The complaint also alleges that Respondent violated Section 8(a)(3), (4), and (1) by imposing more onerous working conditions on employee Viola Pena by requiring her to attend an unwarranted "loss prevention" interview. Albertson's filed a timely answer that admitted the allegations of the complaint concerning the filing and service of the charge, interstate commerce and jurisdiction, labor organization status, and supervisory and agency status as clarified; it denied the substantive allegations of the complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Albertson's, I make the following.

¹ All dates are in 2008 unless otherwise indicated.

Findings of Fact

I. Jurisdiction

Albertson's, a limited liability corporation, with offices and places of business in various states of the United States, including a facility at 2551 E. Lohman, Las Cruces, New Mexico, is engaged in the retail sales of groceries, meat, and related items where it annually derives gross revenues in excess of \$500,000 and purchases and receives goods valued in excess of \$50,000 directly from points outside the State of New Mexico. Albertson's admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Background

As indicated, Albertson's operates a grocery store at 2551 E. Lohman in Las Cruces. Danny Ma is director of labor relations for Albertson's Southwest Division. He serves as in-house counsel for the division, dealing with employee related issues such as arbitrations, unfair labor practice charges, elections, and collective bargaining negotiations. About 30-35 percent of the Albertson's stores in the Southwest Division are union-represented. Ma serves as a trustee on several union-management trust funds created pursuant to collective bargaining. Gabriel Guzman is associate labor relations representative; he reports to Ma. Robert Redford is a district manager whose district includes the store in Las Cruces, New Mexico. Ozzie Carrillo is store director for the Las Cruces store involved in this case; his predecessor was William Allen. Frank Seil is division loss prevention manager and Mark Zyblut is district loss prevention manager. Their duties include providing a safe environment for customers and employees, conducting internal investigations, protecting the company's assets, conducting training, making recommendations on security issues and working with the Human Relations Department and the Labor Relations Department. In conducting investigations, Seil and Zyblut gather and report facts but they do not discipline or recommend discipline.

On September 13, 2007, the Board conducted an election among the employees at the Las Cruces store to determine whether they wanted to be represented by the Union. After the Union lost the election it filed objections and a hearing on those objections was held on October 23-25, 2007. Viola Pena, the alleged discriminatee in this case, provided testimony in support of objectionable conduct that ultimately lead the Board to set aside the election and ordered a rerun. Pena has worked for Albertson's for about 27 by years. Pena was among several employees who testified in support of the Union at the hearing on objections. The Union lost the second election as well.

Albertson's has a no-solicitation policy that, among other things, lawfully forbids employees from soliciting during working time. Albertson's does not forbid employees from talking to each other so long as they continue to work. Albertson's also operates a hotline program where employees can voice complaints about management or other employees. Those complaints are assigned to the Loss Prevention Department. During the 2005-2007 time-period about 19 hotline calls concerning the Las Cruces store were made and investigated.

Pena works as a receiver at the Las Cruces store; as such she assures that the merchandise received is consistent the shipping papers and that the merchandise is then

relocated so that it can be placed on the shelves in the store. In September she confronted Anita Rios, floral supervisor,² and scolded her for asking employees whether they were going to vote for the Union in the election; Pena asserted that it was illegal for Rios to do so. The discussion between Rios and Pena later continued inside the produce cooler for about 15-20 minutes when Juan Rodriguez, produce manager, finally told them to get back to work. Rios works in the produce area, Pena does not. On September 18 Becky Garibay, a store administrator at the Las Cruces store, called Robert Redford, a district manager for Albertson's. Garibay reported that she had witnessed Pena yelling at Rios that Rios needed to be supporting the union. Garibay also reported that Pena claimed that she had Redford under her finger and that only union people could talk about the election. Redford emailed this information to Guzman with a reminder that Pena had been the employee who had reported William Allen, the previous store director, and Pena's report resulted in Allen being fired. Redford's email indicated that Pena had boasted that if employees did not do as she wanted she would get them fired like Allen. Guzman spoke to Garibay and gathered more information and then in turn sent an email to Seil listing the witnesses to the Rios/Pena incident. Guzman also asked Seil to look into Garibay's claims that Pena threatened the meat manager and kicked a chair in the office that hit another employee in the back. Garibay also claimed Pena cursed and threatened an employee in the grocery department and retaliated against two employees, including the drug department manager by withholding product from them. On September 21 Guzman sent an email to Ma that expanded the nature of the complaints against Pena.

Becky (Store Administrator) called the hotline on Friday, January 18th. She reported that [Pena] was yelling at an associate (Anita) in front of other associates. Becky reported that [Pena] was yelling at Anita to support the union saying that she is the new spokes person for the union and that she and any of the union supporters can say whatever they want when they want and there is nothing anyone can do about it. [Pena] was on the clock and on working time at this time.[Pena] allegedly claimed that no one can tell her anything or oppose her b/c if they do she can call Robert Redford, me, or Loss Prevention and get that person fired, just like William Allen. [Pena] allegedly yelled that the Company supporters can't say a F***** thing and have to keep their mouth shut all through the next election. [Pena] then approached Lupe in the Produce department and asked her "are you scared to voice your support for the union?" Lupe refused to respond and [Pena] began arguing with her. Juan (Produce Mgr.) had to step in and told Viola to get to work and to leave his subordinates alone. Becky reported the above to the hotline. Becky said the hotline refused to take her complaint. Becky is scared of retaliation and said that [Pena] has threatened Peggy Saez recently by saying "c'mon lets take it outside." This complaint should have went [sic] through the hotline.

Also on September 21 an anonymous caller to the hotline complained that Pena threatened male employees by accusing them of sexual harassment and intimidated them by saying that she will get them fired. The caller indicated that employees did not want to work with Pena because of her confrontational behavior and that Pena gets away with anything she wants to and gets her co-workers in trouble whenever they do something that she did not agree with, and that employees were afraid to report the matter to the store director for fear of retaliation. Seil decided to investigate these complaints as he was in the general area. Seil, who has some

² One part-time person works with Rios in the floral department. Rios' name appeared on the election voting list, but her ballot was challenged. There is no evidence in this record that Rios is a supervisor as defined by Section 2(11).

30 years' experience in loss prevention, did so in a manner consistent with other investigations he has conducted for Albertson's. Seil interviewed 12 persons, including Pena, while conducting this investigation.

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B. First Interview

The complaint alleges that during the interview described below Respondent unlawfully interrogated employees about their union membership, activities, and sympathies. On January 22, Seil interviewed Pena at the store; Zyblut was also presented. Seil interviewed Pena first because he learned that she was about to leave work for the day and was not scheduled to work the following day. The interview took place in the store director's office, which is a rectangular office of about 11 feet-by-10 feet with a desk and chairs. Before the interview began, Seil asked Pena if she wanted a witness. Pena selected Yolanda Abreu, a cashier and open supporter of the Union, who then joined the group. The interview was voluntary and with Pena's permission, Seil tape recorded it. Seil explained that he was investigating complaints against Pena. He first referred to the exchange of words between Pena and Anita Rios. Pena explained that Rios had gone into the produce department and asked employees how they were going to vote. Seil asked for the names of the employees; Pena answered that it was Randy and Lupe. Seil asked if they replied to Rios' question; Pena said that Randy told Rios that he was going to vote yes and Lupe told Rios that she did not want to talk about it. So Pena told Rios that it was none of Rios' business. Seil replied "Uh huh. That's reasonable." Pena volunteered more background information concerning threats allegedly made by Store Director Carillo, that the matter went to court [the hearing on the objections], and how Carillo did not recall what had happened. Pena went on to tell Seil how Albertson's attorney had called her the ring leader for the Union. Seil said "Okay, I don't know about that. . . . I'm not involved . . ." but Pena continued to tell Seil for a period of time about how she was not the ring leader. Seil merely listened, interjecting words like "sure" and "okay." Pena went on to tell Seil that she thought another employee was weird and bipolar, about an incident when she and her daughter encountered an employee at a Target and the employee gave Pena a "dirty look" and Pena then laughed at her. Pena volunteered how the Las Cruces store was the worst she had ever worked at. Seil continued to let Pena talk as she voiced several complaints. Seil indicated that he knew Pena was off the next day and asked her if she could come in on paid time and continue the interview; Pena agreed. Seil then said "Um, okay, and again, in these allegations, someone says you're the new spokesman for the union . . ." and Pena laughed. Seil continued ". . . and, and um, I've worked, and we currently have union, we have non-union stores. . . . I started in the grocery business in a union store. That part of the, of the . . . doesn't affect me one bit." Later Seil continued: "Supposedly, no, I guess that was Lupe, I didn't talk to Lupe yet. Supposedly, you asked Lupe, you asked Lupe if she supported the Union and um." Pena interrupted and explained again of the encounter she had with Rios and that she had not talked to Lupe. Near the end of the interview Seil asked Pena:

Was there ever anything, with the um, where you were holding, as a receiver, holding back stuff out of the drug department, that you weren't getting it out to them?

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Pena denied this, said "oh my god" and that the accusation made her angry. The interview continued for a short while and then ended after Seil assured Pena that if false reports were being made about her he would deal with it. This interview lasted 27 minutes.

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The facts in the preceding paragraph are based on the transcript of the tape recording of the meeting offered by the General Counsel. I note that the General Counsel was provided with the tape recording itself.³ To the extent that Pena and Abreu gave testimony contrary to the transcript, I do not credit it. As described below, Pena lacks the ability to accurately describe what she was told during this interview, as she later stated that Seil had accused her of stealing drugs and then later of dealing drugs out of the backroom. Rather, I conclude she has a propensity to exaggerate and create drama when none otherwise existed. Moreover, during cross-examination Pena was unnecessarily combative and evasive; portions of her testimony struck me as incredible. For example, she claimed that she did not recall whether anyone told her and Rios to get back to work after they had an extended conversation in Rios' work area; it seems clear that Rodriguez ordered them to get back to work. She claimed it was Rios who kept extending the conversation, but from my observation of her demeanor I conclude this was very unlikely. Later Pena was given a copy of the tape recording but she did not listen to it. Abreu also testified that Seil accused Pena of stealing drugs. Not only is this testimony contrary to the transcript of the tape recording, it is also contrary to the affidavit she gave to the Board less than two months after the events in question. Abreu's explanation of the inconsistency was entirely unconvincing. Moreover, Pena herself admitted at trial that Seil never used the words "stealing" or "dealing drugs." I concluded Abreu manufactured this testimony to support Pena.

After the interview Pena called Greg Frazier, the Union's secretary treasurer and organizing director, and told him that loss prevention had accused her of dealing drugs out of the back room at the store; as described above Seil did *not* tell Pena that she was being accused of stealing or dealing in drugs. Frazier then called Ma and angrily related that loss prevention had accused Pena of dealing drugs; Ma said he would look into the matter. Ma then called Seil and related the accusation. Again, Seil had said nothing of the sort. After reviewing the tape with Seil, Ma called Frazier and told him that Seil had not made the accusation but rather Seil had indicated the issue was whether Pena had been withholding product. Ma agreed to let Pena listen to the tape recording of the meeting. Frazier had been talking to Pena again when Ma returned the call and she heard Ma's remarks as Frazier placed Ma's call on the speaker system. These facts are based on a composite of the credible testimony of Frazier and Ma. Pena claimed that she told Frazier that she had been accused of stealing, rather than dealing, drugs out of the back room. Frazier contradicted this testimony, testifying that Pena told him she was accused of dealing drugs. Given Pena's propensity for drama-creation, I do not credit her testimony. I have considered the possibility that Pena's erroneous statements were the result of a simple misunderstanding of Seil's remarks, but based on the entire record I reject that possibility. I conclude she knowingly fabricated these accusations against Seil.

Analysis

The General Counsel does not assert that the investigation conducted on September 22 was itself unlawful. An investigation of potential employee misconduct is not necessarily unlawful, even if the potential misconduct occurs while discussing a union with other employees. *Bridgestone Firestone South Carolina*, 350 NLRB No. 52, slip op. at 3-4. In this regard, from the reports made about Pena it seems appropriate for Albertson's to investigate whether a spokesperson for the Union was instructing antiunion employees to not engage in activity protect by Section 7 of the Act. That is, antiunion as well as prounion employees are generally free to discuss the merits of unionization and urge employees to vote in a certain manner.

³ In his brief the General Counsel inexplicably relies on Pena's oral testimony as opposed to the transcript that he introduced into evidence.

Turning to allegation in the complaint, as the General Counsel points out in his brief, interrogations are not per se unlawful; all surrounding circumstances must be assessed to determine whether the interrogation was coercive. *Rossmore House*, 269 NLRB 1176 (1984), *aff'd. sub nom. Hotel Employees, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). *Medcare Associates, Inc.*, 330 NLRB 935 (2000).⁴ On the one hand, the interrogation occurred in the formal setting of the store director's office rather than in a work area. It was conducted by Division Loss Prevention Manager Seil. On the other hand, Pena was an open union adherent. She raised the matter of being labeled as a union spokesperson and did so in a joking fashion. Pena made no effort to hide her support for the Union. During the course of the interview Seil assured Pena that he was not antiunion. There were no unlawful statements made during the interview that might heighten any coercive impact of the questioning. Pena was allowed to have another open union adherent as a representative, thereby further lessening any possible coercive impact. On balance I conclude that the General Counsel has failed to show the questioning had a reasonable tendency to coerce employees in the exercise of their Section 7 rights. I dismiss this allegation.

C. Second Interview

The complaint alleges Respondent imposed more onerous working conditions on Pena by requiring her to attend the second interview, described below, because Pena supported the Union and because she testified in hearing on the election objections. The complaint alleges that during this interview Respondent unlawfully interrogated employees concerning their union activities, threatened employees with unspecified reprisals because they engaged in union activity, and orally promulgated and since has maintained an overly-broad and discriminatory rule prohibiting employees from contacting or speaking to the Union.

The next day, January 23, Seil, Zyblut, Pena and Abreu reconvened as planned; again Pena agreed to have the interview recorded. This time Abreu took detailed notes. Seil then reviewed how Pena had asked for a union representative to attend and how he denied that request after obtaining guidance from his superiors. Seil said that they had talked to a number of people involved in the confrontation that occurred between Pena and Rios. He summarized the matter by describing how "there was some point that Anita had talked to, um, or asked several employees in the store, um, mainly in the produce department, that they were, um, how they were sitting as far as the union is concerned. Is that right?" After Pena answered yes, Seil asked "And based on that information, you confronted Anita in the office area, uh, about why she did such a thing. Is that correct?" After Pena denied confronting Rios, Seil then asked Pena to describe what had happened. Pena finally admitted that she and Rios ended up in the produce cooler discussing the matter but claimed that it was Rios who would not end the conversation; "cause she didn't want to end it. She kept going on and on and on and on." Seil also asked Pena "why is it that you challenged her on it? ... What, what reason did you challenge her for on that?" Seil later asked "Um, so did she admit to, to asking them about what they, what their thoughts were or what their opinions were? Did she admit to that at that point?" After answering Pena then stated that she told Rios "I'm just telling you that if you are doing this, to stop. . . . It's none of your business how anyone votes." Seil then stated, referring to the Union campaign "So both sides can have a conversation about it, as long as they're not intimidating somebody . . . or forcing their hand on somebody." Changing topics, Seil asked "Uh, are you the spokesperson for the Union?" After Pena said that she was not, Seil asked "Did you . . . identify yourself as the spokesperson for the Union? . . . Uh, several folks indicated

⁴ The General Counsel does not assert any test other than this is appropriate for examining the lawfulness of the conduct in this allegation.

that you did.” Pena explained “No, and the joke was on that, like I told you, is that well, when I testified that the lawyers from Albertsons accused me of being the ringleader. And it’s a joke amongst all of us.” Seil replied “yeah, right. (Laughter).” But Seil later asked “Uh, but you don’t recall ever telling the folks out here when that little mix was taking place with Anita that you were the spokesperson for the union?” Pena answered that she did not recall. Then the subject changed to drugs as Seil said that yesterday he had asked Pena whether she had withheld product from the drug department and “Um, and then it came back to me that I accused you of, of dealing in drugs, hiding drugs, and this is nothing of what I said, not even close, and if you were to hear the transcript, I’m not going to play it back for you, I did play it for Danny [Ma.]” And later “And you go out of here and you get a union rep involved, that I called you a drug dealer. Isn’t that a little stretch?” Pena answered “No.” Then Seil said he had the tape of the first interview and he was going to give it to Albertson’s attorneys. After Pena indicated that she might have been confused, Seil asked why she did not call him and clarify the matter. He again assured Pena “I support you guys either way. . . . Either way. . . I mean, the, the union or non-union really doesn’t affect me a, a, a, drop.” He explained that when he started in the business many years ago with A & P every one of his stores was union. Later in the interview Seil suggested that the next time Pena listen carefully to what she was being told so that they would not end up with confusion. Seil then said:

Um, I wouldn’t have a single problem in the world and if you’d come back to me and say “Frank, why’d you accuse me of being a drug dealer?” I don’t need a union doin’ that, okay? Um, um, because that becomes a slanderous statement.

Seil also explained that he did not report to the district managers, that he was a fact finder who just gathered information and turned it over. He said sometimes they asked for his opinion and sometimes they may not. He told Pena and Abreu that whatever their convictions were about the union, they have to keep the tension from affecting the customers. Seil later said “Okay? Let’s, let’s try to work this thing out. Um, obviously you can talk to people about the union, but you can’t ask them their opinions, right?” Pena replied “Right.” Pena voiced several gripes, including that the store manager was singling out union supporters for retaliation. Seil assured her that he would talk to the store manager about the matter.⁵ Seil told Pena:

Um, your situation, I’m sitting here with frustration with Anita, um, the way that properly in a perfect world that should have been handled, is that you and Anita would come in here and you’d go, “Ozzy [Carillo, the store director], this is what happened,” and then Ozzy deals with it, and we’re gonna work that.

He told Pena that instead of talking with Rios directly about the matter something should have been arranged to discuss it with Carillo or another manager who might then have told Rios that she could not continue to ask employees about how they were going to vote in the election. Later Seil said that the initial conversation between Pena and Rios in the office area and then later in the produce department “didn’t need to take place.”

Not to be outdone, on September 25 Pena called the hotline and accused Garibay of falsely accusing Pena of “hiding or holding” merchandise in the drug department. According to the report Pena indicated that on January 22 Seil told her that she had been accused of stealing from the company. Of course, Seil had never done so and on the 23rd specifically clarified to

⁵ During this meeting Seil also made comments concerning store closing. Thereafter Albertson’s informed employees that it was repudiating any implication that it would unlawfully close any store. There is no allegation in the complaint concerning this matter.

Pena that he had not done so; nonetheless Pena continued to make the false accusation. Instead I rely on Seil's testimony. I conclude he was a credible witness. In particular I conclude he was not upset by the fact that Pena called the Union, but rather, he was upset by the fact that Pena wrongly accused him of raising the matter of drug dealing or drug stealing. Seil also credibly testified that Pena's hotline complaint was not independently investigated because it had already been exhaustively covered.

Analysis

As indicated, the General Counsel contends that Albertson's unlawfully threatened Pena with unspecified reprisals. In support of this contention the General Counsel argues that Seil threatened to "give it to our attorneys." But in context I conclude that Seil was merely informing Pena that he would give a copy of the tape recording of the first interview to Albertson's attorney. In light of the serious and erroneous allegations made by Pena, this defensive statement cannot carry implications of unlawful reprisals. The General Counsel also relies on Seil's comment concerning Pena making a "slandorous statement." But given my conclusion above that Pena fabricated the drug dealing allegation, I find nothing unlawful about this admonition. In support of this allegation the General Counsel cites *Long Island College Hospital*, 327 NLRB 944 (1999). But that case is inapposite for at least two reasons. First, in that case the employer threatened to "pursue its legal remedies" against an employee because of statements the employee had made. *Id. at 946*. Here there is no such threat. Second, in that case the Board concluded that the employee's statements "were no more than 'overenthusiastic use of rhetoric.'" *Id. at 947*. Here I have concluded that Pena willfully fabricated the drug dealing claims; this amount to more than mere overenthusiastic rhetoric.⁶ I therefore dismiss this allegation.

Next, the General Counsel contends that Albertson's orally promulgated an overly-broad and discriminatory rule prohibiting employees from contacting or speaking to the Union. In his brief, the General Counsel starts his argument by arguing that Seil was "shocked and upset when he learned that Pena had contacted Frazier, and resented that Pena had involved the Union." I reject this assertion, as I have concluded above that Seil was not angry because of the union involvement but rather was he upset and angry that Pena would make such a serious and baseless accusation against him. Moreover, I decline to parse certain words used by Seil without considering the overall context in which they were made. Rather, I agree with Albertson's that when viewed in context Seil's statements concerning Pena's contact with the Union would not reasonably lead an employee to conclude that it was the nature of the entity contacted, as opposed to substance of the report, that angered him. I dismiss this allegation too.

⁶ It is unclear to me whether the General Counsel, by citing *Long Island College*, is urging that I find that Pena's comments to Frazier remained protected under *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Letter Carriers v. Austin*, 418 U.S. 264 (1974). While I believe such an analysis is not necessary in resolving this case, I nonetheless do so in the event that the Board finds this analysis useful. See *TNT Logistics*, 347 NLRB No. 55 (2006) where at the hearing and in its brief the employer never contended that a letter contained "maliciously false" statements, *Id. at 9*, but the Board concluded that the judge nonetheless should have applied *Sullivan* test. *Id. at 2*. I have already concluded that Pena's remarks to Frazier concerning drug dealing in the backroom of the store were deliberately false. I have little difficulty concluding they were made with malice, intentionally attempting to harm Seil's and Albertson's reputation. It follows that Pena's remarks do not enjoy the protection of the Act.

Continuing, the General Counsel alleges that Albertson's also unlawfully interrogated Pena during the second interview. The second interview was little more than a repeat of the first in this regard. For the same reasons described above, I dismiss this allegation.

5 Finally, the General Counsel argues that the second interview amounted to an unlawful
imposition of more onerous working conditions because Pena supported the Union and gave
testimony before the Board in the post-election hearing on objections. The shifting burden
analysis specified in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981),
10 cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management*, 462 U.S.
393 (1983), applies. Little analysis is needed to dispose of this allegation because it is clear
that the second interview was set before Pena contacted Frazier about the first interview. It is
therefore clear that the second interview would have occurred even if Pena had not contacted
the Union after the first interview. I note again that the General Counsel does not challenge the
legality of the first interview. I further note that there is no evidence that Albertson's was upset
15 by the fact that Pena, among others, testified in the objections hearing. I therefore dismiss
these allegations also.

On these findings of fact and conclusions of law and on the entire record, I issue the
following recommended.⁷

ORDER

The complaint is dismissed.

25 Dated, Washington, D.C., September 10, 2008.

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William G. Kocol
Administrative Law Judge

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7 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and
Regulations, the findings, conclusions, and recommended Order shall, as provided in
50 Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed
waived for all purposes.